

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1434

IN THE
United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
HOWARD COYNE,
Defendant-Appellant.

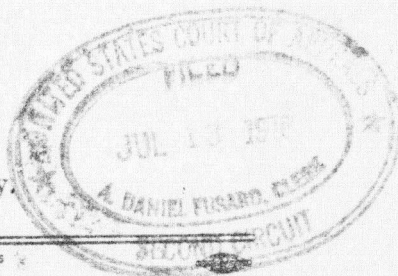
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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No. 77-1434

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
HOWARD COYNE,
Defendant-Appellant.

On Appeal From the United States District Court
For The Western District of New York

BRIEF FOR THE APPELLEE

Statement of Facts

The defendant, Howard Coyne, was the president, majority stock holder and manager of a closely-held corporation known as Sleep Shops Corporation. In mid 1972, creditors of this Corporation began proceedings to seek the involuntary adjudication of the Corporation as a bankrupt. On September 1, 1972, the Corporation filed a Statement of Affairs, signed by the defendant, setting forth summaries of the Corporation's financial position. Shortly thereafter on September 19, 1972, a First Meeting of Creditors was held before the Bankruptcy Court, attended by the defendant, his two attorneys, and others.

The transcript of the First Meeting of Creditors shows that the defendant's testimony began as follows:

The Court: First Meetings. First matter on the calendar. Sleep Shops Corporation.

Mr. Ginsberg, Mr. Privitera, you are appearing for the Bankrupt?

Mr. Ginsberg: Yes.

The Court: Is an officer of the Bankrupt present?

Mr. Ginsberg: Yes.

The Court: All right, please take the stand.

The Court then administered the oath, and questioning proceeded. No statutory immunity claim was raised by the defendant's lawyer nor was the fifth amendment asserted. No express designation of Mr. Coyne was made by the Bankruptcy Judge. Defendant's Brief and Appendix p. 20-a.¹

On February 27, 1974, approximately one and one half years later, following investigation by the FBI and the Federal Grand Jury, an Indictment was returned against the defendant, Howard Coyne, alleging (1) six counts of fraudulently concealing assets from the Trustee of the bankrupt corporation and from creditors, (2) six counts of fraudulently making a false oath when filing the September 1, 1972 Statement of Affairs with the Bankruptcy Court, and (3) one count of conspiring, with his wife and others, to fraudulently conceal and transfer \$60,000 out of the bankrupt's estate.

Following Indictment, the defendant asked the District Court to suppress the use of his testimony before the

¹ The entire transcript of the First Meeting of Creditors, lasting two days, has not been reproduced here as it appears that the only aspects of it material to this appeal are as set forth above. Following these initial remarks by the defendant and the Bankruptcy Judge, the defendant proceeded to discuss the Corporation's financial affairs, generally giving testimony that is best described as exculpatory or vague.

Bankruptcy Court given on September 19, 1972 and October 3, 1972 at the First Meeting of Creditors, and urged that the Indictment be dismissed as having derived from his testimony at this meeting. The defendant's claim was simply that 11 U.S.C., Section 25(a)(10) confers automatic immunity upon a bankrupt testifying at a First Meeting of Creditors, and Section 25(b) extends this grant of immunity to certain corporate principals. After a hearing, Judge Curtin denied the defendant's motions, finding that in order for a *corporate principal* to receive any immunity, the statute clearly requires he be "designated" by the Bankruptcy Court; Judge Curtin held that no express designation of Mr. Coyne was made by the Bankruptcy Judge, hence, defendant's contention that immunity had been conferred was without merit. The Court noted that there being no immunity, there was no need to reach the further question of whether or not the Government made any derivative use of the defendant's testimony in its investigation or before the Grand Jury.

On August 1, 1977, the defendant entered pleas of guilty to Counts 3 and 9, reserving his right to appeal the District Court's denial of his motion to suppress; on October 13, 1977, Judge Curtin sentenced him to a jail term of 18 months plus a \$10,000 fine. The defendant now appeals.

Issue Presented

Whether a voluntary offer to give testimony at a First Meeting of Creditors by the president of a bankrupt closely-held corporation, and subsequent acceptance of such testimony by the Bankruptcy Court constitutes "designation" and confers immunity under 11 U.S.C., Sections 25(a)(10) and 25(b).

ARGUMENT

Judge Curtin properly followed the precedent of the Second Circuit in finding that the grant of immunity to a corporate principal under 11 U.S.C., Sections 25(a)(10) and 25(b) attaches only after the Bankruptcy Court specifically designates one to perform the duties imposed upon the bankrupt by the Bankruptcy Act. The Court made the proper factual finding that Howard Coyne was not so "designated" by the Bankruptcy Judge.

The Bankruptcy Act has provisions conferring immunity on an *individual* bankrupt who testifies before the Bankruptcy Court at a First Meeting of Creditors. The statute is clear that neither testimony nor evidence directly or indirectly derived therefrom shall be used against him in any criminal proceeding. 11 U.S.C., Section 25(a)(10). The statute recognizes a *corporate* bankruptcy situation by specifically providing that:

"Where the bankrupt is a corporation, its officers, the members of its Board of Directors or Trustees or of other similar controlling bodies, its stockholders or members, or such of them as may be designated by the Court, shall perform the duties imposed upon the bankrupt by this title." 11 U.S.C., Section 25(b).

This language itself is unequivocal: case interpretation is equally unequivocal: the statute confers immunity on a corporate principal only if the principal is specifically designated by the Bankruptcy Court to perform the bankrupt's duties.

The defendant contends that the District Court required a finding of a "ritualistic" designation. This, defendant claims, is not required. Defendant's Brief p. 3. The Government does not argue that a "designation" be "ritualistic" (whatever that means), but it is clearly the law that *some formal*

step—designation, direction, order, appointment, etc.—be taken by the Court to confer immunity on a corporate principal.

In his order, Judge Curtin correctly notes that case law on “designation” is surprisingly sparse. Defendant’s Brief and Appendix p. 19-a. However, those few cases which have confronted this issue have settled the question definitively. Unquestionably, the leading interpretation on a grant of immunity to a corporate principal is *U.S. v. Castellana*, 349 F2d 264 (2nd Cir 1965) *cert. denied* 86 S.Ct. 934, 383 U.S. 928, 15 L.Ed. 2d 847 (1966), which upheld a District Court’s finding that certain corporate principals were not granted immunity when testifying at a First Meeting of Creditors because they had never been specifically designated by the Bankruptcy Court. Judge Kaufman’s opinion in *Castellana* holds that the immunity privilege applies only when the officer of a bankrupt corporation has been designated by the Bankruptcy Court to perform the bankrupt’s duties. Absent such a specific designation, the privilege is inapplicable. See also *In Re United States v. Hoffman Can Corporation*, 373 F2d 622, 626 (3d Cir 1967).

Defendant’s claim that *Castellana* is “easily distinguishable” is completely unfounded; while the facts must naturally differ, the precept of granting or not granting immunity to a corporate principal is identical. It is the Government’s argument that not only did Judge Curtin properly rely on this case, but for this Court to accept defendant’s contention would require the effective overruling of *Castellana*.

Other cases are consistent with this view. In *United States v. Weissman*, 219 F2d 837 (2nd Cir 1955), Judge Learned Hand ruled that immunity was extended to a corporate owner based on the Bankruptcy Court’s “direction” of him to sign schedules filed in connection with his corporation’s bankruptcy. Judge Hand found this to be a designation to perform the

duties imposed upon the bankrupt. Defendant erroneously argues that *Weissman* parallels the instant case, and implies that *Weissman* supports his position. Rather, it would seem that *Weissman* was correctly relied upon by Judge Kaufman to firmly establish that a *specific designation* be made before immunity be extended to a corporate principal.

The language of the statute and the cases are not without a basis in public policy and logic. The purpose of the immunity privilege is to assure complete disclosure in bankruptcy proceedings. This Circuit has established that this purpose is adequately served if the immunity privilege is limited only to officers or others specifically designated to perform the bankrupt's statutorily-delineated duties. *Castellana* at 274.

A corporate officer can request "designation" or can assert fifth amendment rights if in his opinion his testimony may be inculpatory. To accept defendant's position—in effect granting an automatic immunity bath to any corporate officer who voluntarily testifies—would "encourage falsification for exculpatory purposes with all advantages to those engaged in defrauding creditors and with every disadvantage to the latter group." *Castellana* at 274.

The District Court carefully and thoroughly reviewed the defendant's appearance and testimony before the Bankruptcy Court and found that the defendant *voluntarily* appeared, with counsel. From all of the circumstances, Judge Curtin concluded simply that the defendant was not specifically designated to perform the duties of the bankrupt corporation and thus no immunity was conferred.

"The transcript of the first meeting of creditors reveals only that the following discussion took place:

The Court: First Meetings. First matter on the calendar. Sleep Shops Corporation.

Mr. Ginsberg, Mr. Privitera, you are appearing for the Bankrupt?

Mr. Ginsberg: Yes.

The Court: Is an officer of the Bankrupt present?

Mr. Ginsberg: Yes.

The Court: All right, please take the stand.

The court then administered the oath, and questioning proceeded. No statutory immunity claim was raised by the defendant's lawyer nor was the fifth amendment asserted. No express designation of Mr. Coyne was made by the Bankruptcy Judge.

It is axiomatic that a corporation can only speak through a living person. Where, as happened here, the Bankruptcy Judge merely asks who is appearing for the bankrupt corporation, and an officer voluntarily takes the stand and testifies, we would be straining language and circumstance to interpret these acts as a 'designation' sufficient to confer immunity under Section 25(b)." Defendant's Brief and Appendix p. 20-a.

Judge Curtin's finding that the defendant was never so designated by the Bankruptcy Court appears to be the only proper conclusion that could have been reached.

Conclusion

The decision of the District Court denying the defendant's motion to suppress evidence should be affirmed, and defendant's plea of guilty to two counts of the Indictment should not be vacated.

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

State of New York)
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USA vs. Howard Coyne
77-1434

I, Leslie R. Johnson being
duly sworn, say: I am over eighteen years of age and
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U. S. Attorney

Leslie R. Johnson

Sworn to before me this
12th day of July, 19 78

Patricia A. Lacey

PATRICIA A. LACEY
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 19